



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 11, 2003

Ms. Nancy O. Williams
Assistant City Attorney
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2003-4030

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182607.

The City of Irving (the "city") received a request for "[a]ny contract or agreement between the [city] and [a named business entity] or any subsidiary, employee, or officer of [a named business entity] during the years 2000, 2001, 2002, and 2003." The requestor also seeks "[a]ny reports or information provided to the [city] by [a named business entity] or its employees, officers or subsidiaries during the years 2000, 2001, 2002, and 2003." You claim that there are no documents responsive to the first part of the request, and that the information responsive to the second part of the request is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information is governed by section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The responsive information that you have submitted consists of completed investigations. Therefore, the city may only withhold this information if it is confidential under other law. Though you raise sections 552.103, 552.107, and 552.111 of the Government Code, these exceptions are discretionary and thus, do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 630 at 4 (1994) (governmental body may waive section 552.107(1)), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the responsive information under sections 552.103, 552.107, and 552.111 of the Government Code.

However, the attorney-client privilege and work product privilege are also found in Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, respectively. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). This office has determined that when the attorney-client privilege or work-product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503 (attorney-client communications) or Texas Rule of Civil Procedure 192.5 (work product). Open Records Decision Nos. 676 at 5-6 (2002), 677 at 8-9 (2002). We will therefore consider whether the submitted information is excepted under these rules.

Rule 503 of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You state that the submitted information “. . . . includes factual information disclosed by the employees for use by an attorney representing the City.” However, you have failed to demonstrate which portion of the submitted information consists of communications between privileged parties or reveal confidential communications. See Open Records Decision No. 676 (2002). Thus, the submitted information may not be withheld under Rule 503.

You further claim that the submitted information is excepted from disclosure because it is attorney work product. An attorney’s core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. See *National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract

possibility or unwarranted fear.” *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Here, you have not shown that the information at issue was created for trial or in anticipation of litigation or that it consists of the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Consequently, the city may not withhold the marked documents under Rule 192.5 as work product.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You argue that certain information in the submitted documents is confidential under article 21.07-6, section 14A(a) of the Insurance Code. Section 14A of article 21.07-6 provides:

(a) Information that identifies an individual covered by a plan is confidential.

(b) During the time the information described in Subsection (a) of this section is in an administrator’s custody or control, the administrator shall take all reasonable precautions to prevent disclosure or use of the information for a purpose unrelated to administration of the plan.

(c) The administrator shall disclose information described in Subsection (a) of this section only:

(1) in response to a court order;

(2) for an examination conducted by the commissioner under this article;

(3) for an audit or investigation conducted under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001, et seq.);

(4) to or at the request of the insurer or plan sponsor; or

(5) with the written consent of the identified individual or his or her legal representative.

Ins. Code art. 21.07-6, § 14A(a)-(b). You argue that

“[a]ll of the documents in question identify an individual covered by the city’s plan under section 14A(a) of article 21.07-6 are confidential by law. At the time of the request, the information was in the Third Party Administrator’s custody or control. The requirements for disclosure set out in subsection (c) section 14A have not been met in regard to this information”

Further, you explain that “[t]he [Third Party Administrator] furnished the records in response to the city’s request, as the insurer, however it did so for the sole purpose of enabling the city to comply with the requirements of the Public Information Act and to seek an Attorney General’s determination.”

Based upon your arguments and our review of the submitted information, we agree that this confidentiality provision is applicable to the information at issue. Accordingly, information that identifies the claimants in the submitted information must be withheld under article 21.07-6 of the Insurance Code. We have marked the identifying information the city must redact prior to release. As we are able to make this determination, we need not address your arguments under common-law privacy or section 552.117 for the individuals at issue.

You also claim that the submitted information contains medical records which are excepted under section 552.101. You assert that portions of the requested information are confidential under the Medical Practice Act (the “MPA”). Some of the records at issue are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the medical records subject to the MPA.

We will now address your argument under section 552.117 for city employees or former employees other than the claimants referred to in the submitted documents. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the information subject to section 552.117.

For those employees who did not make a timely election to keep their section 552.117 information confidential, their social security numbers may be confidential under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

Lastly, we note that the responsive information contains information excepted from disclosure by section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold any Texas driver's license number, vehicle identification number, and license plate number contained within the responsive materials under section 552.130. We have marked a representative sample of the type of information that may be withheld under section 552.130.

In summary, any information contained within the documents in question that identifies the claimants must be withheld under section 552.101 of the Government Code in conjunction with article 21.07-6, section 14A(a) of the Insurance Code. We have marked the types of identifying information the city must redact prior to release. Moreover, the home addresses and telephone numbers, social security numbers, and family member information of other current or former employees of a governmental body who made a timely request that this information be kept confidential under section 552.024 of the Government Code must be withheld under section 552.117. The medical records we have marked may only be released in accordance with the MPA. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990. Lastly, you must withhold any Texas driver's license number, vehicle identification number, and license plate number contained within the responsive materials under section 552.130. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Robert F. Maier
Assistant Attorney General
Open Records Division

RFM/seg

Ref: ID# 182607

Enc. Submitted documents

c: Mr. John Briscoe
Managing Director
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(w/o enclosures)